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No. 84-1667

In the Supreme Court of the United States

OCTOBER TERM, 1985

BETHEL SCHOOL DISTRICT NO. 403, ET AL., PETITIONERS

v.

MATTHEW N. FRASER, A MINOR, AND E.L. FRASER, GUARDIAN AD LITEM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether school officials violated a student's First Amendment rights by disciplining him for delivering an indecent speech at a school assembly, in the absence of a showing that the speech caused a substantial physical disruption.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statutes:

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INTEREST OF THE UNITED STATES

This case raises important questions concerning the ability of school authorities to maintain minimum standards of decency and civility in public schools. While education is primarily the responsibility of state and local governments, the federal government provides substantial amounts of money to support programs in public schools. See, *e.g.*, Education Amendments of 1978, 20 U.S.C. 2701 *et seq.*; Department of Education Organization Act, 20 U.S.C. (& Supp. I) 3401 *et seq.* Those expenditures will be more fruitful to the extent that the recipient schools

are able to maintain an effective educational environment, and we believe that the Ninth Circuit's decision in this case improperly interferes with school officials' efforts to do so.

STATEMENT

1. Respondent, while a senior at Bethel High School in Tacoma, Washington, gave a brief nominating speech on behalf of another student before an assembly of the student body. The speech contained sexual innuendo, but no profane words.[1] The sexual innuendo provoked some hooting, and three students were observed simulating sexual behavior as a result of the speech.[2] The next day, a home economics teacher testified, her students were more interested in discussing respondent's speech than in their classwork, so she devoted approximately ten minutes to a discussion of the speech (Pet. App. A16).

A number of teachers complained to the administration about the speech (Pet. App. B5), and respondent was called into the assistant principal's office the day after he delivered the speech and asked to explain his conduct. At that meeting, respondent was informed that he had vio-

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[1] Respondent stated (Pet. App. A2-A3 (citation omitted)):

> "I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most of all, his belief in you, the students of Bethel is firm.
>
> Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts, he drives hard, pushing and pushing until finally—he succeeds.
>
> Jeff is a man who will go to the very end—even to the climax, for each and every one of you.
>
> So vote for Jeff for ASB vice-president—he'll never come between you and the best our high school can be."

[2] A school counselor testified that he "had seen one student on the side of the bleachers where [he] was sitting actually simulate masturbation and two students on the opposite bleachers were simulating the sexual intercourse movement with hips" (Pet. App. A13).

lated the school's disruptive conduct rule, which states (*id.* at B4-B5 (citation omitted)): "'Conduct which materially and substantially interferes with the educational process is prohibited including the use of obscene, profane language or gestures.'" Respondent was suspended for three days and his name was removed from the list of candidates for speaking at the school's graduation ceremony (*id.* at A6).[3]

2. Petitioner filed a grievance with the school district challenging the school's decision to discipline him. The hearing officer found that respondent had delivered his speech in a class prior to the assembly and that he had been advised by two teachers prior to the assembly that it was inappropriate (J.A. 101). The hearing officer concluded that the speech was "obscene" within the meaning of the disruptive conduct rule (*id.* at 104) because under that rule "obscene" has its "common and ordinary meaning," which includes language that is "indecent" (*id.* at 103). The hearing officer also concluded that a three-day suspension was warranted because respondent had been warned that the speech was inappropriate but nevertheless delivered it (*id.* at 104).[4]

Respondent then sued the school district under 42 U.S.C. 1983, seeking injunctive relief and damages. The district court ordered that any punishment imposed on respondent was null and void and enjoined the school officials from refusing to permit respondent to speak at his graduation exercises. The court based its order on its findings that respondent's speech was protected by the First Amendment and that the high school's disruptive conduct

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[3] Respondent nevertheless was elected to speak at graduation as a write-in candidate (Pet. App. A5).

[4] The hearing officer's decision was based on a written record. The officer noted that respondent was advised that the District would provide an oral hearing if requested, but respondent did not request a hearing. J.A. 100. Respondent does not claim that the procedures followed by the District violated his right to due process.

rule is unconstitutionally vague and overbroad (Pet. App. B7-B8).[5] The court subsequently awarded respondent $278 as damages and $12,750 as costs and attorney's fees (Pet. App. C4).[6]

3. The Ninth Circuit affirmed (Pet. App. A1-A65). The majority first noted (Pet. App. A7-A8), quoting *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969), that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The court also noted that "a student's First Amendment rights are not absolute; the limits of a student's right to express himself must be defined in light of the special characteristics of the school environment" (Pet. App. A7). Furthermore, the court stated that " 'school officials must bear the burden of demonstrating "a reasonable basis for interference with student speech, and . . . courts will not rest content with officials' bare allegation that such a basis existed" ' " (Pet. App. A8 (citation omitted)).

The court then rejected the School District's argument, based on the statement in *Tinker* that student speech is "not immunized by the constitutional guarantee of freedom of speech" if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" (393 U.S. at 513), that respondent's speech had materially disrupted the educational process. Reviewing

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[5] The district court also found that the suspension violated the state administrative code and that the removal of respondent's name from the list of candidates for graduation speaker violated due process (Pet. App. B9). We do not address the state law issue. The due process question is moot since respondent had been elected as a write-in candidate, the district court enjoined the school district from prohibiting him to speak, and he spoke without incident at the graduation ceremony (Pet. App. A43 n.13). The court of appeals vacated the injunction prohibiting respondent from speaking at his graduation as moot (Pet. App. A43).

[6] This case might be moot but for the damage award.

the facts de novo (Pet. App. A10), the court concluded that the speech had not had such an effect.[7]

The court next rejected the school district's argument that, although the speech was not obscene,[8] it was indecent and therefore, under *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), subject to regulation. The court found *Pacifica* inapplicable to this case because that case involved broadcasting into homes[9] where young children could be exposed to the program in question, George Carlin's "Filthy Words" monologue. Accordingly, the court "decline[d] * * * to give public school officials power to regulate the speech of high school students they consider to be indecent" and held that "the First Amendment prohibited the District from punishing [respondent] for making a speech that school officials considered to be 'indecent'" (Pet. App. A32 (footnote omitted)).[10]

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[7] The court noted that "[t]he administration had no difficulty in maintaining order during the assembly and [respondent's] speech did not delay the assembly program" (Pet. App. A15). While the students' reaction to respondent's speech "may fairly be characterized as boisterous," the court concluded that it "was hardly disruptive of the educational process" (Pet. App. A17). Nor, in the view of the court of appeals, did the ten minute discussion in the home economics class the day after the speech amount to a material disruption (Pet. App. A16-A17).

[8] The court noted (Pet. App. A23 n.5) that respondent's speech could not be considered obscene under the standard of *Miller* v. *California*, 413 U.S. 15, 24 (1973), so that it was not excluded from the protection of the First Amendment under *Roth* v. *United States*, 354 U.S. 476 (1957), as the School District conceded.

[9] The court noted (Pet. App. A28 n.8) that, in *Cohen* v. *California*, 403 U.S. 15 (1971), this Court had emphasized the difference between the sanctuary of the home and public areas in holding that a state could not criminally punish a person for wearing a jacket bearing the words "Fuck the Draft" in a courthouse.

[10] The court added: "We fear that if school officials had the unbridled discretion to apply a standard as subjective and elusive as 'indecency' in controlling the speech of high school students, it would increase the risk of cementing white, middleclass standards for determining what is acceptable and proper speech and behavior in our public schools" (Pet. App. A30).

The court also rejected the School District's argument that "school officials may control the language used to convey ideas at school-sponsored events" (Pet. App. A33 (footnote omitted)). The court agreed that school officials had great control over the curriculum, but stressed that respondent's speech was not part of the curriculum, which it construed narrowly to mean classroom work. The court concluded that, because the assembly "was a voluntary activity in which students were invited to give their own speeches," it "was clearly not part of the school curriculum" (*id.* at A34).[11] This, in the court's view, made the assembly an "open forum" (*id.* at A41). The court concluded that since respondent's speech "was neither obscene nor disruptive, the First Amendment protects him from punishment by school officials" (*id.* at A42).

In a footnote (Pet. App. A43 n.12), the court affirmed the district court's ruling "that the school's misconduct rule is constitutionally infirm, because on its face it permits a student to be disciplined for using speech considered to be 'indecent' even when engaged in an extracurricular activity."

Judge Wright dissented (Pet. App. A44-A65). He found respondent's speech "crude and sexually suggestive" and argued that the majority had usurped "the authority of school officials to maintain and enforce minimum standards of decency in public schools" (*id.* at A44). Because schools "instill citizenship, discipline, and acceptable morals," Judge Wright noted, school authorities are entitled to "wide latitude" in condemning unacceptable language (*id.* at A53-A55). In his view, the school officials were fully justified under *Pacifica* in disciplining respondent, since his speech was inappropriate for a school assembly. Judge Wright would have held that "school authorities may prohibit indecent and vulgar

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[11] The court noted that attendance at the assembly was not compulsory since students could choose to go to study hall instead (Pet. App. A34).

speech regardless of whether it satisfies *Tinker*'s 'substantial disruption' standard" (Pet. App. A60).[12] Judge Wright also criticized the majority for its "cursory affirmance of the district court's holding that Bethel High School's disruptive conduct rule is unconstitutionally vague and overbroad," arguing that "[s]chool district rules are not held to the same due process standards for vagueness and overbreadth as criminal statutes" (*id.* at A63).

SUMMARY OF ARGUMENT

It is settled that students' speech is protected by the First Amendment. It is also settled, however, that students' First Amendment rights must be interpreted in light of the special characteristics of the school environment and that school officials may interfere with students' speech if they have a reasonable basis for doing so. While the court of appeals stated that the special characteristics of the school environment were relevant, it did not adequately take those characteristics into account in concluding that a student may deliver any speech at a school assembly so long as the speech is not physically disruptive or legally obscene. Contrary to the court of appeals' analysis, this Court's decision in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), does not limit school officials to prohibiting only speech that has a physically disruptive effect.

Proper analysis of the school environment in accordance with this Court's prior decisions leads to the conclusion that school officials have a reasonable basis for prohibiting the use of indecent language at school assemblies. Public schools have long been viewed as a means of inculcating basic values, including standards of civility and decency in speech. The authority of school officials to condemn indecent speech should not be less than their

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[12] Judge Wright added that he thought that the majority took a constrained view of what constitutes disruption (Pet. App. A60).

authority to condemn the use of racial epithets or religious slurs, particularly in connection with regular school activities, or to require the use of standard respectful forms of address in the classroom. The conclusion that public school officials may reasonably prohibit indecent speech is reinforced by the fact that high school students do not have the full constitutional rights of adults, particularly in matters involving sexually suggestive material. Regulation of student speech in the high school environment should be permitted if officials have a reasonable basis for the regulation grounded in the maintenance of an atmosphere of civility or the transmission of basic societal values, so long as the regulations do not, as in *Tinker*, suppress student expression of a particular political viewpoint.

The school officials reasonably concluded in this case that respondent's speech was indecent and that it violated the school's disruptive conduct rule. That rule, according to its plain meaning, prohibits indecent speech. School authorities have interpreted it that way, and it is their interpretation that controls. Since school officials may prohibit indecent speech, the rule is not constitutionally infirm. Nor was it improperly applied in this case. School authorities acted well within the scope of their discretion in determining that respondent violated the rule by delivering his speech to the assembled student body. Contrary to the court of appeals' conclusion, that assembly, while not a formal part of the curriculum, was not an open forum over which school officials had no control. Rather, students were assembled for the limited purpose of listening to speeches regarding the associated student body, an organization which, under state law, is regulated by local school officials. Students should not have to listen to indecent speech at such an assembly any more than they should have to endure racial epithets or religious slurs.

ARGUMENT

SCHOOL OFFICIALS ACTED REASONABLY IN SUSPENDING RESPONDENT

A. This Court's Decisions Do Not Hold That School Officials May Only Proscribe Speech That Causes Physical Disruption Or Is Legally Obscene

Although the Ninth Circuit correctly recognized certain basic principles that must govern application of the First Amendment in a school setting, it improperly adopted a rigid rule of decision that is neither compelled nor supported by this Court's decisions. The court of appeals held that school authorities cannot punish a high school student's speech unless it is obscene within the meaning of *Miller* v. *California*, 413 U.S. 15 (1974), or creates a physical disruption (Pet. App. A42). The court below relied primarily on *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), and *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), to support this holding. However, these cases in particular, and this Court's decisions in general, do not support the Ninth Circuit's basis for decision.

1. It is common ground that students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (*Tinker*, 393 U.S. at 506). It is also well-established, as the court of appeals noted (Pet. App. A7), that those rights "must be construed 'in light of the special characteristics of the school environment.'" *Board of Education* v. *Pico*, 457 U.S. 853, 868 (1982) (plurality opinion), quoting *Tinker*, 393 U.S. at 506. The court of appeals also recognized, citing *Eisner* v. *Stamford Board of Education*, 440 F.2d 803, 810 (2d Cir. 1971), that school officials must demonstrate a "reasonable basis" for interference with student speech (Pet. App. A8), and that "'school officials and teachers must be accorded wide latitude over decisions affecting the manner in which they educate students'" (Pet. App.

A7, quoting *Nicholson* v. *Board of Education*, 682 F.2d 858, 863 (9th Cir. 1982)). If the Ninth Circuit had applied a standard based on these principles it is unlikely that we would have quarreled with its decision. Such a standard acknowledges that students have First Amendment rights while also permiting school officials to promulgate and enforce "rules against conduct that would be perfectly permissible if undertaken by an adult." *New Jersey* v. *T.L.O.*, No. 83-712 (Jan. 15, 1985), slip op. 13.

While the court of appeals stated that analysis of the special characteristics of the school environment is required, it did not in fact evaluate those characteristics. Rather than giving weight to school officials' conclusions as to what rules are reasonable in the school environment, the court applied the sort of heightened scrutiny that is appropriate for review of government regulation of adult speech in a public forum. Nothing in this Court's decisions, however, bars school officials from promulgating and enforcing rules prohibiting indecent speech, or otherwise applying reasonable regulations to speech in the high school context, so long as the regulation is not a means for suppressing student expression of a particular political viewpoint.

2. The essential error of the court of appeals was to view the authority of school officials as being strictly limited to avoiding physical disruption of classrooms. The court of appeals interpreted *Tinker* to require an actual threat of physical disruption before any restriction may be imposed on a student's speech. That is a misreading of the Court's opinion.

In *Tinker* the Court interpreted the school's actions as censoring expression of a political viewpoint by banning the wearing of black armbands to protest the Vietnam War. The Court equated prohibition of the armbands with a regulation "forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property" (393 U.S. at 513). It was relevant to the Court's decision "that the school au-

thorities did not purport to prohibit the wearing of all symbols of political or controversial significance" (*id.* at 510), and the Court concluded that "a particular symbol * * * was singled out for prohibition" (*id.* at 510-511). Thus the Court in *Tinker* was confronted with a situation, not present on the facts of this case, where school officials acted with the apparent purpose and effect of eliminating one particular political viewpoint while allowing similar expression of other viewpoints. Indeed the Court's opinion expressly indicated that it did not purport to deal with situations involving school rules setting standards of decency and civility: "The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or *deportment*" (*id.* at 507-508 (emphasis added)).

Moreover, the *Tinker* Court did not impose on school officials a standard as restrictive as that applied by the Ninth Circuit. The Court stated in *Tinker* that a student may express opinions "if he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others" (393 U.S. at 513 (brackets in original), quoting *Burnside* v. *Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). The Court stressed the question of whether the speech in *Tinker* had disrupted classes because the district court in that case had upheld the school district's ban on the wearing of such armbands on the basis of a "fear of a disturbance from the wearing of the armbands" (393 U.S. at 508). It was in the context of addressing the "fear of disturbance" argument that the Court stated that conduct which "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" is not protected by the First Amendment (*id.* at 513). But nothing in the Court's decision implies that school officials may *only* enforce rules proscribing actual disruption of classroom activities or that they cannot enforce rules establishing reasonable standards of civility and decency.

In finding a "material disruption" standard to be the exclusive standard for judging school officials' interference with student speech, the court of appeals held that "the rationales of *Pacifica* have no applicability" (Pet. App. A29). To be sure, the facts of *Pacifica* are distinguishable. As the court of appeals stressed, it involved broadcasting into homes where young children would be exposed to the indecent, but not obscene, broadcast in question. However, while attendance at a school assembly is in some ways different than sitting in " 'the sanctuary of the home' " (*Cohen* v. *California*, 403 U.S. 15, 21 (1971) (citation omitted)), it is also true that the radio broadcast in *Pacifica* could be shut out by the listener, who would lose only the opportunity to hear the broadcast. If a student absented himself from the assembly where respondent recited his speech, in contrast, the student would lose the value of participation in an important student function (see pages 25-27, *infra*). In addition, while it is true, as the court of appeals stated, that high school students are not "impressionable young children" but are instead "young adults" (Pet. App. A29), high school students are not fully adult either. Recognizing that *Pacifica* presented a somewhat different factual context is not the same as concluding that it has no applicability to this case. Its relevance lies in its recognition that in some cases, particularly those involving minors, it is appropriate to regulate speech that is indecent but not obscene (see 438 U.S. at 732; *id.* at 756 (Powell, J., concurring in part and in judgment)).

Thus, contrary to the court of appeals's decision, *Tinker* and *Pacifica* do not mandate its conclusion (Pet. App. A42) that school officials may only prohibit speech that is legally obscene or physically disruptive. In *Tinker*, the Court determined that a material disruption of classroom activities would not be protected by the First Amendment, but it did not hold that school officials are barred from regulating speech in the absence of a

physical disruption when the regulation does not prohibit expression of a particular viewpoint. Similarly, in *Pacifica* the Court held that indecent speech could be regulated under the facts of that case, but it did not hold that indecent language could never be prohibited in other cases. The court of appeals erred by not considering whether the special characteristics of the school environment that were not relevant in *Tinker* or addressed in *Pacifica* permit reasonable regulation of indecent student speech.

B. The Special Role Of Public Schools, Which This Court Has Recognized, Shows That School Officials May Prohibit Indecent Speech Because They Are Charged With Inculcating Basic Values

This Court recently stated in *New Jersey* v. *T.L.O.*, *supra*, that school officials may prohibit conduct that would be perfectly permissible if undertaken by an adult if such regulation is reasonable.[13] Proper analysis of the special characteristics of the school environment leads to the conclusion that school officials not only may prohibit speech that materially interferes with classroom activities but also may prohibit indecent speech and preserve basic standards of civility in the school environment. As Judge Newman stated (*Thomas* v. *Board of Education*, 607 F.2d 1043, 1057 (2d Cir. 1979) (concurring), cert. denied, 444 U.S. 1081 (1980), "[s]chool authorities can regulate

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[13] In *New Jersey* v. *T.L.O.*, *supra*, the Court considered the Fourth Amendment rights of high school students in light of the special characteristics of the school environment. The Court concluded that "[i]t is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject" (slip op. 13). In particular, the Court held that school officials need not obtain a warrant before searching a student and that searches of students need not be based on probable cause to believe that the student had violated the law (*id.* at 13-15). Therefore, a school official was justified in searching the purse of a student suspected of smoking in the school lavatory in violation of a school rule, even though smoking by adults is not illegal.

indecent language because its circulation on school grounds undermines their responsibility to try to promote standards of decency and civility among school children."

1. An analysis of the special characteristics of the school environment relating to the use of indecent language by students begins with the understanding that public education in this country has traditionally been viewed not only as a means of teaching the skills needed to function in society, but also as a way of supplementing the family's role in the transmission of the society's basic values from one generation to the next. See Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 Tex. L. Rev. 477, 496-505 (1981). This concept of education as an institution to inculcate basic values was current in the earliest days of the Republic. Thus one writer stated that "education * * * will be immensely deficient, unless it be professedly extended to [students'] morality, as well as their literature." Dogget, *A Discourse on Education* (1796), in *Essays on Education in the Early Republic* 151 (F. Rudolph ed. 1965) [hereinafter cited as *Essays*]. Noah Webster expressed a similar view: "Education, in a great measure, forms the moral characters of men, and morals are the basis of government. Education should therefore be the first care of a legislature * * *." Webster, *On the Education of Youth in America* (1790) (footnote omitted), in *Essays* 64. Benjamin Rush, a signer of the Declaration of Independence, wrote an essay on public schools offering the opinion that "society owes a great deal of its order and happiness to the deficiencies of parental government being supplied by those habits of obedience and subordination which are contracted at schools." Rush, *A Plan for the Establishment of Public Schools and the Diffusion of Knowledge in Pennsylvania; to Which are Added Thoughts Upon the Mode of Education, Proper in a Republic* (1786), in *Essays* 16.

Nineteenth Century reformers relied on the concept of education as a means of inculcating social and moral values as one of the principal arguments supporting the establishment of universal public elementary education. Horace Mann, extolling the importance of "moral education" and the "reformatory and elevating influence" of properly administered public schools, wrote that "the common school * * * may become the most effective and benignant of all the forces of civilization." Mann, *Report of the Massachusetts Board Of Education* (1848), in *An American Primer* 341, 343, 351 (D. Boorstin ed. 1966). Mann and other proponents of a public school system argued that education was a proper expense for the entire society to bear since "public education must prepare pupils for citizenship in the Republic * * *. It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." C. Beard & M. Beard, *New Basic History of the United States* 228 (rev. ed. 1968). Horace Mann's concept reflected the practice of the time: "The average schoolma'am of that day was no less concerned with molding character than with molding mind, and to this purpose, too, the McGuffey Readers, with their pious axioms of conduct and their moral tales, contributed powerfully." 2 S. Morison & H. Commager, *The Growth of the American Republic* 306 (4th rev. ed. 1950).

That the public schools properly remain concerned with inculcating moral values as well as with imparting knowledge has been recognized by recent decisions of this Court. Public schools serve to "awaken[] the child to cultural values" (*Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954)) and to "preserv[e] * * * the values on which our society rests." *Ambach* v. *Norwick*, 441 U.S. 68, 76 (1979). The Court recently agreed that "local school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit

community values,' and that 'there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.'" *Board of Education* v. *Pico*, 457 U.S. 853, 864 (1982) (plurality opinion) (citation omitted). This function of public schools is also recognized in the statutes of the Washington State school system, which admonish public school teachers "to impress on the minds of their pupils the principles of morality, truth, justice, temperance, humanity and patriotism [and] to teach them to avoid idleness, profanity and falsehood." Wash. Rev. Code Ann. § 28A.67.110 (1982).

The point of this brief excursion into the history of public education is that public schools bear a different relationship to their students than any other level of government in our society bears to adult citizens. By focusing narrowly on the question whether behavior actually disrupts classwork, and ignoring whether behavior disrupts school officials' efforts to inculcate basic standards of civility and decency, the court of appeals did not properly consider the special characteristics of the school environment. Indeed, even assuming, as the court of appeals did, that only "disruptive" student speech may be regulated, an understanding of the role of public schools in our society shows that indecent speech disrupts the work of the school.

2. Another special characteristic of the school environment that the court of appeals ignored is that, at the high school level, school officials regulate the behavior of minors rather than adults. While children have constitutional rights, "the constitutional rights of children cannot be equated with those of adults." *Bellotti* v. *Baird*, 443 U.S. 622, 634 (1979). The special constitutional status of children limits their First Amendment rights, particularly where sexually suggestive material is involved. Thus in *Ginsberg* v. *New York*, 390 U.S. 629

(1968), the Court sustained a New York statute forbidding the sale to minors of sexually related material that was conceded not to be obscene and thus could not constitutionally have been prohibited for sale to adults. The Court "recognized that even where there is an invasion of protected freedoms, 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults'" (*id.* at 638, quoting *Prince* v. *Massachusetts*, 321 U.S. 158, 170 (1944)). And in *Pico*, while the Court determined that it was not clear why school officials had removed certain books from a high school library (see 457 U.S. at 883 (White, J., concurring in judgment)), the Court assumed that school officials properly could remove books if they did so because the books were "pervasively vulgar" (*id.* at 871 (plurality opinion)). Indeed, the plurality noted that the committee charged with review of the books in question "was instructed to make its recommendations based upon criteria that appear on their face to be permissible—the books' 'educational suitability,' 'good taste,' 'relevance,' and 'appropriateness to age and grade level'" (*id.* at 873 (citation omitted)).[14]

In other areas of constitutional analysis as well, this Court has recognized that regulation of the conduct of minors in schools demands special deference to school authorities. As mentioned above, in *New Jersey* v. *T.L.O.*, *supra*, the Court molded the requirements of the Fourth Amendment to fit the high school environment. The

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[14] The courts of appeals have recognized that school authorities may restrict student's First Amendment rights in ways that would not be permissible by government officials dealing with adults outside the school context. For example, in *Seyfried* v. *Walton*, 668 F.2d 214, 220 (1981), the Third Circuit sustained a school superintendent's decision to cancel a school play which he found to be "vulgar and inappropriate because of sharp sexual overtones." Similarly, the Second Circuit sustained a school's decision to prohibit the distribution by a student newspaper of a questionnaire inquiring into students' sexual habits. *Trachtman* v. *Anker*, 563 F.2d 512 (1977), 435 U.S. 925 (1978).

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Court's crafting of procedural due process requirements for the school setting also has proceeded with reference to the needs of school officials for maintaining discipline. In *Goss* v. *Lopez*, 419 U.S. 565 (1975), the Court approached the question of what process is due a high school student facing suspension mindful of the admonition that " '[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . . By and large, public education in our Nation is committed to the control of state and local authorities' " (*id.* at 578, quoting *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968)). More specifically, the Court sought to avoid over-formalizing the suspension process and creating an adversary atmosphere in order to assure that suspension would not grow "too costly as a regular disciplinary tool" and to preserve "its effectiveness as part of the teaching process" (*id.* at 583).[15] In short, the constitutional right to due process was defined in *Goss*, as was the Fourth Amendment right in *T.L.O.*, so as not to interfere with the needs of discipline in the high school setting.

C. High School Officials May Regulate Students' Speech If They Do Not Suppress Expression Of A Particular Viewpoint

School officials are justified in insisting that all communications (whatever the content of their ideas) and interactions be conducted in ways marked by mutual respect and civility. Surely a student nominating speech which used racial epithets or religious slurs should be

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[15] In *Goss* the Court held that a high school student facing a suspension for not more than ten days must be given oral or written notice of the charges against him, an explanation of the evidence school authorities have, and an opportunity to present his side of the story (419 U.S. at 581). No delay is required between notice of the suspension and the student's opportunity to explain himself, and the Court defined several situations in which notice and hearing before the suspension may not be required (*id.* at 582).

liable to discipline with or without the showing of the kind of atmospheric reverberations which respondent's speech was shown to have occasioned here. Indeed, we submit that a ban on such slurs and epithets in the more formal context of classroom discussion or even the rough and tumble of an athletic contest would seem indispensable to most school authorities and should be recognized as proper by this Court. Similarly, and more affirmatively, if a school insisted that teachers be addressed as Mr. or Ms. and that some suitable form of address be used towards students themselves during class discussion, this too should be seen as a normal and constitutionally proper exercise of the school's civilizing mission.

The inculcation of attitudes of mutual respect between individuals, between racial and ethnic groups, and between the sexes is not only a valuable educational goal in itself, but also a precondition for the kind of rational exchange of ideas which is at the heart of what the First Amendment seeks to protect in the school context. In this broader perspective, sexually suggestive speech is not only contrary to ideas of decency but may contribute to an atmosphere which some students find demeaning or distracting, and thus an impediment to their studies.[16] Indeed, it has become accepted in the courts of appeals that an employer unlawfully discriminates against some of his employees under Title VII if he creates a workplace in which highly offensive sexual remarks are commonplace. See, *e.g.*, *Katz* v. *Dole*, 709 F.2d 251, 254-255 (4th Cir. 1983); *Bundy* v. *Jackson*, 641 F.2d 934, 943-944 (D.C. Cir. 1981). It would be remarkable if the kinds of limits which an employer may be required to institute to maintain a proper atmosphere in

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[16] As Judge Wright observed in dissent in the court below, evidence was introduced in this case to show that respondent's speech was sexually harassing and demeaning to female students (Pet. App. A62).

an adult workplace, school administrators were prevented from enforcing in a high school.

Thus, a proper understanding of the role of public schools and the constitutional status of high school students requires that school officials be permitted some regulation of speech based on its content. Regulation of student speech in the high school environment should be permitted if officials have a reasonable basis for the regulation grounded in the maintenance of an atmosphere of civility or the transmission of basic societal values, so long as the regulations are not used to suppress student expression of a particular political viewpoint.

Regulation on the basis of content is, of course, the exception rather than the rule (see *Pacifica*, 438 U.S. at 761 & n.3 (Powell, J., concurring in part and in judgment)). And, as the court of appeals noted, respondent was punished for "the language and verbal imagery he used" (Pet. App. A42), regulation which at least to some extent affects the content of speech. But as we have noted, and as the Court recognized in *Pacifica* (438 at 744-748 (Stevens, J.); *id.* at 757-759 (Powell, J., concurring in part and in judgment); *id.* at 768 n.3 (Brennan, J., dissenting)), some degree of content-based regulation is permissible with respect to indecent speech aimed at minors. In this respect, it is important to keep in mind that a prohibition on indecent language does not restrict the "marketplace of ideas" to any significant extent (see *id.* at 745-746 (Stevens, J.)). Furthermore, restrictions on the use of indecent language are "viewpoint neutral" since most viewpoints can be expressed without the use of vulgar language.[17] The only sense in

[17] We are not unmindful of Justice Harlan's warning in *Cohen* v. *California*, *supra*, that "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process" (403 U.S. at 26). While we accept the force of this observation in a public forum context, it certainly must be open to school officials to guide and even to control students' choice of words. To hold otherwise would

which a restriction on the use of indecent language at school is not viewpoint neutral is that the restriction shows that school officials disapprove of the use of such language. But in our view school officials may reasonably conclude—indeed, they ought to conclude—that it is their duty to teach high school students that indecent language is not an acceptable part of civilized public dialogue.

That school officials must be permitted to prohibit indecent speech is seen most clearly by considering the effect of the Ninth Circuit's ruling in cases involving speech that is not obscene under the standards set out in *Miller* v. *California*, 413 U.S. 15, 24 (1973). The "Filthy Words" monologue at issue in *Pacifica* of course did not meet the *Miller* standards (see 438 U.S. at 756 (Powell, J.)). Yet, that monolgue (the text of which is set out in 438 U.S. at 751-755) is obviously inappropriate for delivery at a school assembly. Under the Ninth Circuit's holding, however, a student could not be punished for delivering such a speech to assembled high school students in the absence of a more serious physical disturbance than the one that accompanied and followed respondent's speech. Similarly, since Cohen's jacket was not legally obscene (see 403 U.S. at 20), any student would be free to wear such a jacket in school, under the Ninth Circuit's decision, as long as a physical disturbance did not result. Such a result obviously impedes school authorities' proper efforts to maintain standards of decency and civility. A proper understanding of the role of high schools leads to the conclusion, as Judge Newman stated, that "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket" (607 F.2d at 1057 (concurring)).

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undercut not only the imposition of standards of decency and civility but even, carried to extreme, an English teacher's efforts to require that the rules of grammar be followed.

D. The Conception Of Free Speech Urged Here Is Consistent With The Government's Position In *Bender* v. *Williamsport Area School District*

We recently argued, in *Bender* v. *Williamsport Area School District*, No. 84-773 (argued Oct. 12, 1985), that the Establishment Clause does not prevent school officials from permitting a voluntary student religious group from meeting on school property during an activities period. In that connection, we recognized that high school students have free speech rights (U.S. Amicus Br. at 20-21). We argued that high school students are essentially no different than the college students involved in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), in terms of their ability to understand that permission to meet did not amount to endorsement of religion by school officials; and that the Equal Access Act, Pub. L. No. 98-377, Tit. VIII, 98 Stat. 1302 *et seq.*, represents Congress' considered conclusion to that effect. This conclusion is wholly consistent with the position we urge here.

First, our principal contention in *Bender* was that the Establishment Clause does not *require* school administrators to discriminate against religious speech in contexts where a wide variety of forms of speech are permitted. This case, of course, does not involve the Establishment Clause. Second, we argued in *Bender* that the Equal Access Act precluded such discrimination where a secondary school maintains a limited open forum under certain defined circumstances. The assembly involved in this case was not that type of forum (see pages 25-27, *infra*). Third, a ban on all religious speech responds to concerns which are quite different from those which might motivate a school to ban indecent speech or racial epithets. The latter ban goes far more to tone and style than to content. Finally, the principal argument confronted by petitioners in *Bender* was the fear that they, unlike the college students in *Widmar*, would not be able to discern the difference between official endorsement and mere permission. The Equal Access Act traverses

that factual assumption. The fact that high school students are mature enough to discern that schools are not officially endorsing religion when they permit a voluntary student religious group to meet does not mean that these students are not in need of the school's guidance in matters of civility and decency.

F. The School District Reasonably Enforced Its Rule In This Case

The actions taken by the Bethel School District in this case were reasonable. First, its disruptive conduct rule prohibited the use of indecent language, which, as we have shown, is permissible, and the rule is not unconstitutional. Second, school officials reasonably applied the rule to punish respondent.

1. The School District's rule prohibits "the use of obscene, profane language or gestures." As the hearing officer concluded (J.A. 103), school officials intended this rule to be interpreted according to the plain meaning of the words, not according to the definition of "obscene" developed by this Court.[18] "Obscene" means "offensive to modesty or decency; indecent, lewd." *Random House Dictionary of the English Langauge* 994 (1966). Thus, the rule prohibits indecent language.

It is clear that the school officials' interpretation of the meaning of the rule controls and that the rule is not open to interpretation by the federal courts. As this Court noted in *Wood* v. *Strickland*, 420 U.S. 308, 326 (1975), 42 U.S.C. 1983 "does not extend the right to relitigate in federal court * * * the proper construction of school regulations." That conclusion was repeated in *Board of Education* v. *McCluskey*, 458 U.S. 966, 970 (1982) (per curiam), where the Court held that a court of appeals erred in determining, contrary to the conclu-

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[18] In *Miller* v. *California*, 413 U.S. 15, 18-19 n.2 (1973), the Court noted that its definition of "obscene" is different than the dictionary meaning.

sion of school officials, that a school rule prohibiting students from being under the influence of "drugs" on school property was a proper basis for suspending a student who was drunk at school. The Court held that it was up to the school board, not the federal courts, to determine whether "drugs" included alcohol. Therefore, the school district's determination that "obscene" means "indecent" is not open to question. Furthermore, school officials determined that the use of indecent language by itself is disruptive of the educational process, by including the use of indecent language in its "disruptive conduct" rule. As we have shown, that conclusion is reasonable.

The court of appeals in this case appeared to accept the school district's interpretation of its rule as prohibiting the use of indecent language, holding that "the school's misconduct rule is constitutionally infirm, because on its face it permits a student to be disciplined for using speech considered to be 'indecent' " (Pet. App. A43 n.12). It was on the basis of its conclusion that the First Amendment barred the school district from prohibiting indecent speech at a school assembly that the court of appeals determined that the rule is unconstitutional. There is no reason to invalidate the rule, even under the court of appeals' approach, once it is understood that school officials may prohibit the use of indecent language.

2. Nor is there any basis for challenging the application of the rule to respondent. It is the function of school officials rather than federal courts to determine what type of speech violates the appropriate standard of decency. Indeed, that kind of determination is part of the ordinary daily business of classroom teachers as well as school superintendents. As noted above, this Court has "long recognized that local school boards have broad discretion in the management of school affairs" and that "federal courts should not ordinarily 'intervene in the resolution of conflicts which arise in the daily operation

of school systems.'" *Pico*, 457 U.S. at 863-864 (1982) (plurality opinion)), quoting *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968). Whether respondent's speech violated the school's disruptive conduct rule is a matter best left to school officials, who are most familiar with the appropriate standard of decency to be applied. They determined that the speech was "indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly" (J.A. 103). Since that conclusion is quite reasonable, there is no warrant for reevaluation of the school officials' determination.

The court of appeals was troubled (Pet. App. A30-A31) that decisions of school authorities as to what constitutes indecent speech will inevitably vary from one community to another. However, in concluding that the First Amendment precludes enforcement of community standards of decency in the schools because other communities may have different standards (*ibid.*), the court of appeals misunderstood the nature of public schools. This Court has recognized that "local sharing of responsibility for public education" is a vital part of the American tradition, allowing parents, through their local school board, "[d]irect control over decisions vitally affecting the education of [their] children." *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 49 (1973), quoting *Wright* v. *Council of Emporia*, 407 U.S. 451, 469 (1972). As the Court also recognized, a consequence of local control is that "[e]ach locality is free to tailor local programs to local needs" (411 U.S. at 50). The fact that, under this system, different schools may adopt different standards of civility and decency is a sign of the strength and vitality of the system; it is not a reason to conclude that school officials are confined to standards representing the lowest common denominator.

Finally, the court of appeals emphasized that respondent's speech was delivered at a school assembly rather than in a classroom. In the court's view, the fact

that the assembly was an "extra-curricular activity" (Pet. App. A38) in the sense that it was not a classroom activity is highly significant. But the facts in the record, which the court below reviewed de novo, do not support the court of appeals' treatment of the assembly as something apart from the school's formal activities and its characterization of the assembly as an open forum.

While not a formal part of the curriculum, the assembly at which respondent delivered his nominating speech was an exercise in which the regular life of the school was formally implicated. Under Washington law, the associated student body is a "formal organization of the students of the school formed with the approval of and regulation by the board of directors of the school district." Wash. Rev. Code Ann. § 28A.58.115 (Supp. 1986). Two characteristics of the assembly at which Fraser spoke are clear from this statutory authorization.

First, the student government process is subject by statute to regulation by the governing body of the school just as the school curriculum is. Thus, the statute confirms what common sense suggests. While school officials' authority to maintain standards of decency may not extend beyond school property or school functions, their authority clearly extends beyond individual classrooms to the hallways and assembly rooms of their schools.

Second, the Washington state statute creates a "formal organization of the students." Thus the assembly was part of the regular, general processes of the school in which students could expect to be able to participate. The court below made much of the fact that students who did not wish to attend the assembly and be subject to the offense of Fraser's remarks could instead attend a study hall. But the court's proposed solution has the defect of requiring students to forego the opportunity to participate in a function that the school and Washington state law have provided for their benefit. Students wishing to participate in the regular, general processes of the school had to subject themselves to respondent's distasteful re-

marks. It is our position that a student should no more have to accept this as a feature of his school activities than he should have to endure racial epithets or religious slurs.

The court of appeals' treatment of the school assembly as the equivalent of an "open forum" highlights the court's willingness to substitute its own judgment about how a school should function for that of school administrators. The court of appeals recognized that the assembly was part of the educational process in that it gave "students an opportunity to gain practical experience in the democratic process" (Pet. App. A41). Having recognized the didactic function of the assembly, the court of appeals nonetheless insisted on enforcing *its* view of how the assembly could be made a learning experience for the students. To the contrary, it follows from the court's characterization of the function of the assembly that school officials could properly insist on the maintenance of standards of decency and civility, not that they were required to abdicate their duty to teach such standards. Indeed, school officials might conclude that the opportunity to teach appropriate standards of decency and civility is greatest at assemblies and that, conversely, respondent's ability to undermine the school's responsibility to inculcate such values is greatest at an assembly of the entire student body.

Thus, the assembly was not an "open forum," as the court of appeals stated (Pet. App. A41), or even a "limited open forum" of the sort described in the Equal Access Act, Pub. L. No. 98-377, § 802(b), 98 Stat. 1302 (to be codified at 20 U.S.C. 4071(b)); pages 22-23, *supra*. The assembly was not open to different groups, but was provided for the express purpose of permitting speeches by candidates for the associated student body and by students nominating candidates. There is no basis for the court of appeals' treatment of the assembly as beyond the ordinary control of school authorities over school functions.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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